United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1737

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1737

UNITED STATES OF AMERICA,

Appellee,

—v.—

PHILIP TRAVERS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Philip Travers appeals from an order filed in the United States District Court for the Southern District of New York on May 13, 1974, by the Honorable Milton Pollack, United States District Judge, denying his petition for a writ of error *coram nobis.*

Statement of Facts

Indictment 68 Cr. 1016, filed in the Southern District of New York on December 20, 1968, charged Travers and five co-defendants in twenty-one counts with mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342, and in one count with conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Travers was tried before Judge Pollack and a jury and found guilty on twenty of the twenty-one

mail fraud counts and on the conspiracy count. On December 5, 1969, Judge Pollack sentenced Travers to two years' imprisonment on each count, the sentences to run concurrently. The judgment of conviction was affirmed by this Court, *United States* v. *Kellerman,* 431 F.2d 319 (1970), and the Supreme Court denied *certiorari,* 400 U.S. 957 (1970). Travers has served his sentence.

The evidence at trial established that Travers and his co-defendants had participated in a conspiracy to sell and distribute counterfeit Diners' Club credit cards. The conspirators obtained a substantial number of embossed duplicate cards of Diners' Club members, unembossed cards, a machine with which to emboss the blank cards, and a list of Diners' Club members. Despite several attempts, they never succeeded in using the machine to emboss the blank cards. However, one of the conspirators, Joseph Pucci, used one of the embossed duplicate cards to make numerous purchases. Each of these purchases formed the basis of a substantive count in the indictment. Travers was present at several of these purchases and on one occasion asked that a purchase be made for his benefit.

The only use of the mails alleged in the indictment and proved at trial was the mailing of credit card invoices from the merchants whose goods Pucci had purchased to the Diners' Club offices and the subsequent mailing of notices by the Diner's Club to the merchants. On direct appeal Travers argued, *inter alia,* that such use of the mails was insufficient to bring his conduct within the ambit of the federal mail fraud statute. This Court rejected that argument. 431 F.2d at 322-323.

On January 8, 1974, the Supreme Court decided *United States* v. *Maze,* 414 U.S. 395 (1974). The Court held that where the fraudulent scheme charged involved the obtaining of services with a stolen credit card, and the sole use of the mails alleged and proved was the mailing of credit card in-

voices from the merchant to the issuer of the card, such use of the mails was insufficient to bring the scheme within the reach of the federal mail fraud statute.

On February 6, 1974, Travers, having already completed service of his sentence, petitioned for a writ of error *coram nobis* to vacate and expunge his conviction in 68 Cr. 1016 on the basis of the Supreme Court's decision in *Maze*. Judge Pollack denied the petition by order filed May 13, 1974.

ARGUMENT

United States v. *Maze*, 414 U.S. 395 (1974), should not be applied retroactively to vacate Travers' conviction.

A. Introduction

The sole question presented on this appeal is whether a defendant whose conviction had become final under a valid criminal statute can later secure the retroactive application of a narrowed interpretation of that statute. The Government agrees that had the Supreme Court's construction of the mail fraud statute in *Maze* been the law in this Circuit at the time of Travers' trial, he could not have been convicted. It by no means follows, however, that his conviction should now be vacated.* Recent decisions of the

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* Travers, having completed service of his sentence, has sought relief by means of a petition for a writ of error *coram nobis*. However, as this Court has held, relying on *United States* v. *Morgan*, 346 U.S. 502, 511 (1954), ". . . the 'extraordinary' remedy of *coram nobis* is available 'only under circumstances compelling such action to achieve justice.'" *United States* v. *Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963). For reasons detailed *infra*, we submit that the decision in *Maze* should not be applied retroactively; these same reasons equally compel a finding that *coram nobis* relief, under the stringent standard in

[Footnote continued on following page]

Supreme Court have taught that the determination of the retroactivity of a new rule turns upon a careful weighing of several factors. It is clear that the extent of past reliance on a superseded rule is a consideration of prime importance in the weighing process. Thus Travers' insistence that he could not have been convicted under *Maze* misses the mark; had *Maze* been the law in this Circuit he would never have been prosecuted under the mail fraud statute. Rather, he would have been prosecuted by the state law enforcement authorities, who would have chosen among several other available weapons to prosecute his indisputably illegal activity. Travers can, at most, claim that he was prosecuted in the wrong forum. Such a claim, it will be shown, is insufficient to warrant the retroactive application of *Maze*.

B. Prior retroactivity decisions in the Supreme Court

The vast majority of Supreme Court retroactivity decisions have concerned constitutional rules of criminal procedure; relatively few concern, as does this case, questions of substantive law. The first decision to consider the retroactive application of such a rule of criminal procedure was *Linkletter* v. *Walker*, 381 U.S. 618 (1965), in which the Court limited the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), to prospective application. It held that it was "neither required to apply, nor prohibited from applying, a decision retrospectively," 381 U.S. at 629, and set forth three criteria by which the retroactivity of a decision should be determined: (a) the purpose to be served by the

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Morgan and *Garguilo*, is not warranted for Travers and others similarly situated. Beyond those reasons, there is the further point that Travers by no means suggests that he committed no unlawful conduct, and setting aside his conviction, when the statute of limitations precludes further prosecution under state statutes, can hardly be the kind of "justice" the Supreme Court in *Morgan* and this Court in *Garguilo* had in mind.

new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards.*

Employing the *Linkletter* analysis, the Supreme Court has declined to apply retroactively most of its newly announced constitutional rules of criminal procedure. See *Tehan* v. *Shott*, 382 U.S. 406 (1966) (adverse comment by judge or prosecutor on defendant's failure to testify); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) (use of statements elicited in violation of *Miranda* and *Escobedo*); *Stovall* v. *Denno*, 388 U.S. 293 (1967) (absence of counsel at line-up); *DeStefano* v. *Woods*, 392 U.S. 631 (1968) (denial of jury trial in serious cases of criminal contempt); *Desist* v. *United States*, 394 U.S. 244 (1969) (use of evidence obtained through illegal electronic surveillance); *Williams* v. *United States*, 401 U.S. 646 (1971) (use of evidence obtained in a search not incident to arrest); *Adams* v. *Illinois*, 405 U.S. 278 (1972) (right to counsel at preliminary hearing); *Michigan* v. *Payne*, 412 U.S. 47 (1973) (imposition of higher sentence on retrial). The Court has, however, applied retroactively those new rules which it has found affect "the very integrity of the fact-finding process". See *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963) (right to counsel at trial); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (exclusion of co-defendant's confession implicating defendant); *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (right to counsel to counsel at probation revocation proceeding); *Berger* v. *California*, 393 U.S. 314 (1969) (right to confront absent witness); *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972) (requirement of proof beyond a reasonable doubt in juvenile proceedings).

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* For the purposes of this discussion, the Government adopts the definition of retroactivity employed by the Supreme Court in *Linkletter*: the application of subsequent changes in the law to "prior final judgments . . . collaterally attacked." 381 U.S. at 627.

More recently the Supreme Court has had occasion to consider the retroactivity of decisions announcing changes in substantive law. These cases are best analyzed by dividing them into two categories: those in which the announced changed created a constitutional bar to prosecution, and those in which the bar was merely statutory or jurisdictional. As the following analysis will demonstrate, only the former group of decisions have been given retroactive effect.

In this first category are *Robinson* v. *Neil*, 409 U.S. 505 (1973), and *United States* v. *U.S. Coin and Currency*, 401 U.S. 715 (1971). In both of these cases the Court applied its previous decisions retroactively because in both the defendants could validly assert that the previous decisions rendered their conduct constitutionally immune from punishment.

Coin and Currency considered the retroactivity of *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), which held that the Fifth Amendment precluded the criminal prosecution of gamblers who failed to comply with various registration provisions of the gambling tax laws. The Court held these decisions retroactive, invalidating prior prosecutions, both civil and criminal, under such laws. It reasoned that "the conduct being penalized is constitutionally immune from punishment". 401 U.S. at 724. The Court further stated:

> "Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the fact finding process at trial. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, 388 U.S. 293 (1967). Rather *Marchetti* and *Grosso* dealt with *the kind of conduct that cannot constitutionally be punished in the first instance.* These cases held that

> gamblers . . . had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them. In the absence of a waiver of that right, such persons could not properly be prosecuted at all." 401 U.S. at 723 (Italics supplied).

Robinson v. *Neil, supra,* involves a similar constitutional bar to prosecution. The Court there held retroactive its decision in *Waller* v. *Florida*, 397 U.S. 387 (1970), which held that the constitutional guarantee against double jeopardy barred successive state and municipal prosecutions based on the same offense. As it had in *Coin and Currency,* the Court found the analysis used in *Linkletter* and its progeny inapposite:

> "The guarantee against double-jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." 409 U.S. at 509.

In sum, the principles considered in *Coin and Currency* and *Robinson* were given full retroactive effect because any prosecutions commenced in violation of those principles were constitutionally infirm *ab initio.*

Recent decisions have made clear, however, that the retroactivity doctrine of *Coin and Currency* and *Robinson* should be applied sparingly, even in cases involving a significant change in constitutional interpretation affecting criminal liability. In *United States* v. *Alexander,* 498 F.2d 934 (2d Cir. 1974), a defendant who had been convicted of violating 18 U.S.C. § 1465 under the obscenity standard of *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966) and whose

conviction had become final, brought an action pursuant to 28 U.S.C. § 2255 alleging that *Miller* v. *California*, 413 U.S. 15 (1973), had formulated a new definition of obscenity by which his conduct should be measured. Although the *Miller* reformulation raises the possibility that some defendants have been convicted under the *Memoirs* standard for conduct now deemed "constitutionally immune from punishment" under the First Amendment, this Court declined to apply *Miller* retroactively, holding that the newly announced *Miller* standard was not applicable to convictions which had become final by the date *Miller* was decided. 498 F.2d at 935. One week later, in *Hamling* v. *United States*, — U.S. —, 42 U.S.L.W. 5035, 5039 (June 24, 1974), the Supreme Court strongly intimated that the holding in *Alexander* was correct.

In marked contrast to *Coin and Currency* and *Robinson*, the Supreme Court has been unwilling to give retroactive effect to changes in substantive law where such changes are not grounded in any absolute constitutional prohibition. Into this second category falls *Gosa* v. *Mayden*, 413 U.S. 665 (1973). In *Gosa*, the Court declined to accord retroactivity to *O'Callaghan* v. *Parker*, 395 U.S. 258 (1969), which held that a serviceman charged with a crime not "service connected" is entitled to indictment and trial by jury in a civilian court. In reaching its conclusion the Court was careful to distinguish the case before it from *Coin and Currency* and *Robinson*, holding that both of those cases concerned "a constitutional right that operates to prevent another trial from taking place at all". 413 U.S. at 679. *Gosa*, however, presented the problem of a valid prosecution brought in the wrong forum:

> "The question was not whether [the defendant] could have been prosecuted; it was, instead, one related to the forum, that is, whether, as we have said, the exercise of jurisdiction by a military tribunal, pursuant to an act of Congress, over his nonservice-

> connected offense was appropriate when balanced against the important guarantees of the Fifth and Six Amendments." 413 U.S. at 677.

Because it found no explicit constitutional bar to the prosecution by a military tribunal, the Court applied the three-pronged test suggested in *Linkletter*. It concluded that the *O'Callaghan* doctrine merely directed a different choice of forum and thus did not reflect on the integrity of the truth-determining process. For that reason, and because substantial reliance had been placed by prosecutorial authorities on the availability of military jurisdiction, the *O'Callaghan* doctrine was limited to prospective application, even though it was clear that as a matter of law Gosa was not guilty of violating 10 U.S.C. § 920.

The foregoing survey demonstrates that the Supreme Court has limited the retroactive application of its decisions to two rather limited groups of cases: those decisions which call into question the validity of the fact-finding process in prior prosecutions, and those decisions which hold prosecutions for specific conduct constitutionally void *ab initio*. The *Maze* decision falls into neither category.

C. Maze should not be applied retroactively

1. The precedent of Gosa v. Mayden controls the instant case

The Government submits that the same considerations which impelled the *Gosa* court to deny retroactivity to *O'Callaghan* v. *Parker* require that retroactivity be denied *United States* v. *Maze*. Like *O'Callaghan, Maze* did not concern prosecution of an activity constitutionally immune from punishment; the Court left no doubt that the fraudulent use of credit cards was properly punishable. Like *O'Callaghan, Maze* concluded that the activity in question had been prosecuted under an inapplicable statute or, in

other words, in the wrong forum.* There is no question here, for example, but that Travers' activity was punishable under New York law.** In *Maze*, having found that the acts of mailing were wholly incidental to the fraud, the Supreme Court concluded that the relation of the use of the mails to the fraudulent scheme was insufficient to trigger the operation of the mail fraud statute. It scarcely concluded, or even intimated, that the activity in question was beyond the reach of prosecution.

Moreover, the Government submits that the considerations governing the choice of forum in *O'Callaghan* were far more compelling than those in *Maze*; despite such considerations, *O'Callaghan* was found non-retroactive. The *O'Callaghan* court determined that a soldier was entitled to prosecution in a civilian court because of the Fifth and Sixth Amendment rights of the indictment by a grand jury and trial by jury. There are no such countervailing constitutional considerations to be invoked for Travers here: a state court prosecution for larceny or forgery entitles a

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* Indeed, in *O'Callaghan* the Court's holding that the military courts had exceeded their jurisdiction rested on significant constitutional guarantees. In *Maze*, however, there was no suggestion that credit card fraud was not a proper subject for the assertion of federal criminal jurisdiction. In fact, the Court specifically alluded, 414 U.S. at 404-405 & n. 9, to 15 U.S.C. § 1644 as a proper basis for federal prosecution of credit card frauds. Of course, that section was not in force at the time of Travers' offenses or indeed at the time of his trial.

** It is clear, for example, that in New York Travers could have been prosecuted for larceny (§§ 155 *et seq.* of the Penal Law), forgery (§§ 170 *et seq.* of the Penal Law), and for unauthorized use of a credit card (§ 513 of the General Business Law). In addition, a new "theft of services" statute was added to the Penal Law in 1969, which rendered guilty of a misdemeanor one who "obtains or attempts to obtain a service, or induces or attempts to induce the supplier of a rendered service to agree to payment therefor on a credit basis, by the use of a credit card which he knows to be stolen" (§ 165.15 of the Penal Law).

defendant to no greater safeguards than the federal prosecution to which Travers was subjected. The *Gosa* decision, denying retroactivity in the face of the assertion of Fifth and Sixth Amendment rights, thus applies here *a fortiori*.

2. Application of the *Linkletter* test compels a denial of retroactivity

The Court's decision in *Gosa* suggests that even though the Linkletter test is strictly applicable only to determine the retroactivity of new constitutional rules of criminal procedure, its three criteria are pertinent in any discussion of retroactivity. 413 U.S. at 679. The Government submits that all three of the *Linkletter* factors—the purpose of the new rule, the reliance of law enforcement authorities on prior standards, and the effect on the administration of justice of retroactive application—militate strongly against the retroactive application of *Maze*.

(a) The purpose of the *Maze* decision

Although the Supreme Court has long held the purpose to be served by the new rule to be foremost among the factors bearing on retroactivity, *Desist* v. *United States*, 394 U.S. 244, 249 (1969), this factor diminishes in importance when the new rule, as here, has no constitutional significance. Similarly, the purpose of the *Maze* ruling is less significant than the purpose behind the evidentiary exclusionary rules in *Linkletter* and *Desist*, which the Court identified as the deterrence of illegal police action. The *Maze* decision's purpose is simply to define the outer limits of the mail fraud statute. The Government submits that this purpose does not mandate the retroactive application of the decision. For in the cases cited above the Court has emphasized repeatedly that the holdings which will be given retroactive effect are those which enhance the reliability of the fact-finding function at trial or prevent punishment which is constitutionally precluded. Nothing in the

Maze decision calls into question the validity of the truth-determining process in prior prosecutions under the mail fraud statute. There was no question in *Maze,* nor is there here, that a fraud was proven beyond a reasonable doubt; it was simply not a fraud that fell within the jurisdictional ambit of the mail fraud statute.

It should be noted, furthermore, that in *Gosa* the Court denied retroactivity even though it conceded that the improper choice of forum did taint the fact-finding process to some degree. It noted that the constitutional rights to indictment and trial by jury inevitably played "some role in assuring the integrity of the truth determining process." 413 U.S. at 665. The Court denied retroactivity nevertheless. Here, in contrast, it surely cannot be maintained that a state prosecution for larceny would be "purer" than a federal prosecution for mail fraud. The fact-finding processes in federal and state tribunals are indistinguishable. Hence, none of those considerations which in *Gosa* weighed in favor of the retroactivity of a jurisdictional rule are present in the instant case.

(b) Reliance by law enforcement authorities

The second of the *Linkletter* criteria is the extent of the reliance of law enforcement authorities on the old standards.* The factor militates strongly in favor of prospectivity here.

Ever since the use of credit cards became prevalent, and the existence of credit card frauds an increasingly per-

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* The Court has noted that the second and third factors of the *Linkletter* test assume greater importance when the purpose of the rule in question does not clearly favor either retroactivity or prospectivity, as is the case here. *Desist* v. *United States, supra,* 394 U.S. at 251 (1969); *DeStefano* v. *Woods, supra; Stovall* v. *Denno, supra; Johnson* v. *New Jersey, supra.*

sistent problem,* law enforcement authorities had relied on the availability of the mail fraud statute to prosecute credit card fraud. This Circuit had consistently held, in a long line of decisions, that such fraudulent conduct was properly prosecuted by the mail fraud statute.** Its view was, moreover, consistent with that of a majority of Courts of Appeals that had considered the question.*** Law enforcement authorities were thus entitled to rely on the use of the statute in prosecuting credit card fraud and, more importantly, in foregoing prosecutions of such fraud under perfectly valid state statutes. Thus, Travers' assertion that had *Maze* been the law during the pendency of this prosecution he would never have been convicted is somewhat misleading. Had *Maze* been the law, he would never have been *prosecuted* under Sections 1341 and 1342 of Title 18; he would, instead, have been prosecuted and convicted under any of a variety of statutes available to state law enforcement authorities.

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* The *Maze*, decision noted, 414 U.S. at 399 n. 4, that in 1969 there were more than 300 million consumer credit cards in circulation, and that approximately 1.5 million such cards were lost or stolen in that year. Losses due to credit card fraud had risen from $20 million in 1966 to $100 million in 1969.

** See *United States* v. *Kellerman*, *supra*; *United States* v. *Chason*, 451 F.2d 301 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *United States* v. *Madison*, 458 F.2d 974 (2d Cir.), *cert. denied*, 409 U.S. 859 (1972); *United States* v. *Osher*, 485 F.2d 573 (2d Cir. 1973), *vacated and remanded*, 415 U.S. 971 (1974).

*** See *United States* v. *Ciotti*, 469 F.2d 1204 (3d Cir. 1972), *vacated and remanded*, 414 U.S. 1151 (1974); *Adams* v. *United States*, 312 F.2d 137 (5th Cir. 1963); *Kloian* v. *United States*, 349 F.2d 291 (5th Cir. 1965), *cert. denied*, 384 U.S. 913 (1965); *United States* v. *Thomas*, 429 F.2d 407 (5th Cir. 1970); *United States* v. *Kelly*, 467 F.2d 262 (7th Cir. 1972), *cert. denied*, 411 U.S. 933 (1973); *United States* v. *Kelem*, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1970).

Only two circuits had held the mail fraud statute inapplicable to such fraudulent credit card transactions. *United States* v. *Lynn*, 461 F.2d 759 (10th Cir. 1972) and *United States* v. *Maze*, 468 F.2d 529 (6th Cir. 1972), *aff'd*, 414 U.S. 395 (1974).

There is yet another way in which the reliance factor militates against the retroactive application of *Maze*. Government prosecutors also relied on this Circuit's construction of the mail fraud statute in preparing cases for trial. Under pre-*Maze* standards, the only evidence of mailing necessary was of the mailing of credit slips from the merchant to the issuer of the credit card. Thus, even if further evidence of the use of the mails sufficient to satisfy the *Maze* standard existed, the Government felt under no compulsion to seek it out or to offer it. It is thus likely that some convictions under the statute may be defective by *Maze* standards only because the Government tailored its proof to the evidentiary standard required by this Court. Although the case at bar may not be such a case, this Court should nevertheless be mindful of jeopardizing such convictions should it hold *Maze* retroactive.

(c) The impact on the administration of justice

The final factor in the *Linkletter* test is the effect on the administration of justice of holding the new doctrine retroactive. There can be no question but that if *Maze* is held retroactive, a substantial number of convictions will be affected, and that the district courts will be inundated with petitions for post-conviction relief. See *Davis* v. *United States*, — U.S. —, 42 U.S.L.W. 4857, 4866-4867 (June 10, 1974) (Rehnquist, *J.*, dissenting).

Moreover, it may be anticipated that the district courts will not merely be confronted with the petitions of those whose convictions are clearly insufficient under *Maze* but also that many others validly convicted of credit card fraud under the mail fraud statute will also be induced to burden the district courts with their efforts to bring their cases within the fact pattern of *Maze*.

Another significant impact on the administration of justice would be the burden on state authorities of retrying those whose convictions had been vacated. Memories will

have faded, and witnesses and evidence will have disappeared. See *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965); *Michigan* v. *Payne*, 412 U.S. 47, 57 (1973). Some of those who would successfully overturn their convictions, such as Travers here, would be beyond the reach of state st[illegible]ces of limitations.* Reprosecutions of those who were not would add to the burden of an already critically overloaded state court system.

The Government further submits that the important principle of finality in criminal convictions will be seriously undermined if those who are patently guilty of fraud, as Travers is here, are permitted to attack their convictions because of a subsequent narrowing of the ambit of the mail fraud statute. Although finality is scarcely a significant consideration where defendant's conduct activity was "constitutionally immune from punishment", it becomes highly relevant where his conduct was clearly culpable under state law and proven to be at trial. Judge Friendly has questioned the societal interest in permitting collateral attack on criminal judgments where the petitioner's guilt is not seriously at issue. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). This concern has recently been reiterated by Mr. Justice Powell, concurring in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 262 (1973):

> "No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that subsequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."

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* See New York Criminal Procedure Law § 30.10.

See also *Sanders* v. *United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). The interest of finality is hardly served by vacating a conclusive and unequivocal finding of guilt for conspiracy and fraud now rendered inconclusive only because the prosecution was commenced under the wrong statute and therefore in the wrong forum. Cf. *Gosa* v. *Mayden, supra*, 413 U.S. at 685:

> "We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, particularly military ones, no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved."

3. The cases on which Travers relies are inapposite.

Travers' arguments in favor of retroactivity are bottomed on the supposed controlling authority of two cases, *United States* v. *Osher*, 415 U.S. 971 (1974), *vacating and remanding*, 485 F.2d 573 (2d Cir. 1973), and *United States* v. *Liguori*, 438 F.2d 663 (2d Cir. 1971). Both cases are readily distinguishable.

In *Osher*, the Supreme Court vacated and remanded this Court's most recent decision holding the mail fraud statute applicable to credit card frauds. Travers argues that this

suggests that the Court has already held *Maze* retroactive. This argument overlooks the careful distinction drawn in *Linkletter* v. *Walker* that while a change in the law will be given effect to a case on direct review, "the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity'." 381 U.S. at 627. See also *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Vanderbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940); *United States* v. *Chambers*, 291 U.S. 217 (1934). *Osher* was before the Supreme Court on direct appeal, and in vacating the conviction the Court did no more than adhere to the distinction drawn in *Linkletter*. The *Osher* order thus has no bearing on the retroactivity of *Maze*. See also *United States* v. *Alexander*, *supra*.

Nor is this Court's decision in *United States* v. *Liguori*, 438 F.2d 663 (2d Cir. 1971), controlling here. In that case, this Court, declining to apply the *Linkletter* test of retroactivity, held *Leary* v. *United States*, 395 U.S. 6 (1969), fully retroactive. *Leary* had held that (former) 21 U.S.C. § 176a, which permitted a jury to infer illegal importation of marijuana and the defendant's knowledge thereof from its mere possession, contained a conclusive presumption which violated the due process clause of the Fifth Amendment. The retroactive application of *Leary* in *Liguori* thus did no more than set aside convictions predicated on a constitutionally infirm statutory presumption which "established" conclusively two of the three "principal" elements of the offense. The *Maze* decision, in contrast, involves no such constitutional dimension. The construction of the mail fraud statute by this Court in this case on direct appeal and in the other cases that followed prior to *Maze* was not constitutionally defective, and it can hardly be argued that Congress could not constitu-

tionally forbid conduct which, before *Maze,* was held to violate the mail fraud statute on the basis of mailings of the type proved here. Thus, in contrast to *Liguori,* no constitutional taint precludes application of the *Link-letter* test. Under that test, as the Government has shown, a finding of retroactivity is wholly unwarranted.

CONCLUSION

The order below should be affirmed.

Respectfully submitted,

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